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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1571

J. J. NOSSER, *et al.*,
Petitioners,

v.

JAMES BRADLEY, *et al.* and
KATIE RUTH ANDERSON, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners have requested this Court to review the en banc decision of the Court of Appeals for the Fifth Circuit which unanimously held that petitioner Breazeale was liable to respondents under 42 U.S.C. §1983 for summarily punishing them without due process of law, and that petitioner Robinson was liable to respondents under Mississippi law for failing to take them before a magistrate. This brief in opposition is submitted by respondents to set forth their views as to why the petition should be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly found that judgment notwithstanding the verdict was appropriate when the facts are undisputed.

2. Whether there is an issue of vicarious liability in this case since the court below did not find any petitioner liable under the doctrine of respondeat superior.

3. Whether the court below properly held petitioner Breazeale liable for summarily punishing respondents without due process of law.

4. Whether the court below properly held petitioner Robinson liable under state law because of his undisputed denial of respondents' right to be taken before a magistrate.

5. Whether petitioner Breazeale has any immunity from damages for violation of the constitutional rights of persons in his custody.

6. Whether any of the facts relied on by the Fifth Circuit in reaching its decision were controverted.

STATEMENT OF THE CASE

The facts as stated by petitioners are not entirely in accord with the record or with the facts as set forth by both the panel below and the en banc court. Accordingly, respondents will restate the facts as shown by the record.

It is important to note at the outset that the panel relied "solely on stipulations and undisputed testimony" in reaching its decision (App. 9), and the en banc court similarly relied only on facts which "appear without dispute" (App. 54). In large part, the undisputed facts upon which both courts imposed liability were established by the pleadings or by stipulation or admission of counsel, and were set forth in a pre-trial order approved by the district judge and all counsel for all parties.[1] The remaining facts were established by admissions of peti-

[1] For the convenience of the Court, the relevant portions of the pre-trial order are reprinted as an Addendum in this Response. The Addendum is hereafter referred to as "Add."

tioners or their witnesses. Relying solely on evidence which thus appears without dispute, we briefly review the facts.

On October 2, 3, and 4, 1965, respondents and many others paraded in Natchez, Mississippi to protest racial discrimination. R. 201; Add. 1. At the time, a Nachez ordinance prohibited parades without the written permission of the chief of police. R. 201-02, 969. The ordinance was unconstitutional, but at the time it had not been judically so declared. R. 202. The marchers were arrested by petitioner Robinson and other Natchez police officers for violating this ordinance, on October 2 after proceeding half a block, on October 3 "shortly" after the march commenced, and on October 4 after 60 yeards. R. 202, 206; Add. 1, 3.

After the arrests on Saturday morning, October 2, respondents were transported to the Natchez city auditorium where they were detained until late Saturday night. R. 203; Add. 1-2. During that time, and indeed during the entire time they were incarcerated, they were not brought to a judicial officer for examination of their cases, nor was any attempt even made to secure a magistrate. R. 203, 303; Add. 2.

Late that Saturday night those respondents arrested during the day were transported by bus to the Mississippi State Penitentiary at Parchman, more than 200 miles away. Arrangements for the transfer had been made late Friday evening, October 1, or early Saturday morning, October 2, prior to any arrests, when an unidentified Natchez official telephoned petitioner Breazeale, the penitentiary superintendent, to determine if space was available to house prisoners from Natchez. R. 569, 586. This was the only communication made to Breazeale regarding the transfer. R. 587. The initial group of prisoners arrived at the penitentiary early Sunday morn-

ing, October 3, and were taken to its maximum security unit on orders of respondent Breazeale. Thirty-nine cells had been vacated for the Natchez prisoners (R. 205, Add. 2), and more than 250 prisoners were ultimately housed there. R. 590; Pl. Ex. 2-A.

The State Penitentiary at Parchman is the authorized place of detention for convicted felons in Mississippi. Miss. Code 1942 Ann. §7922 (Supp. 1968). They are normally housed in open camps. R. 566-67. However, prisoners who violate prison rules or who are dangerous may be sent to the maximum security unit for punishment. R. 215, 567, 585. The punishment, in such cases includes stripping the prisoner, giving him a laxative, requiring him to sleep without bedding, depriving him of his possessions and not permitting him any exercise. See R. 211, 584, 592.

In cases, such as the present one, where local prisoners were sent to the State Penitentiary on the ground that local jail space was unavailable, Superintendent Breazeale confined them in the maximum security unit, and he saw no reason to vary the standard punishment imposed there on pentitentiary prisoners who committed acts requiring additional punishment. R. 568, 585-86. Accordingly, on their arrival at the maximum security unit, all of the male prisoners from Natchez were required to strip naked, and all women were ordered to remove their shoes, stockings, sweaters, coats, jewelry and wigs. The respondents were required to consume a quantity of laxative.[2] They were deprived of all personal belongings, including sanitary napkins and medicines. R. 205, Add. 3.

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[2] Petitioners state "all prisoners were offered and some took a laxative." The pre-trial order, which is controlling, states that all prisoners "were required to strip naked and consume a quantity of laxative." Add. 3. There was no element of voluntariness.

Respondents were inspected and searched, and then led to the cells. The cells contained two steel bunks without matresses or other bedding,[3] a toilet without seat, and a washbasin. R. 204-05, 556; Add. 2. See Pl. Ex. 1, a photograph of a representative cell. Up to eight persons were placed in each cell. R. 225, 358, 555. There were no towels, soap or the like. The temperature ranged from 60 degrees to perhaps 70 degrees. R. 551.

After being in their cells for varying periods of time, some of the respondents were permitted to get only their underwear. R. 274, 378-79, 424. Some were permitted to wear undersirts, but not underpants. R. 378. Some were nude for periods up to 36 hours. R. 274. Others were never given even underwear. See R. 447-48. Petitioners' own witness did not contradict this testimony. *Cf.* R. 556-57.

Other indignities were inflicted, as shown by uncontradicted testimony of respondents. In addition to lack of sanitary facilities such as towels, soap, toothbrushes, toothpaste, and drinking cups, there was inadequate toilet paper, exacerbated by the fact that each respondent had been forced to consume a laxative. The rule of thumb in issuing toilet paper seems to have been about one lap around a roll for each person in a cell. See R. 226, 266, 325, 376, 404, 460. Some respondents had to use their hands to clean themselves. See R. 268-69.[4]

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[3] Petitioners state that "mattresses, pillows and covers were not available in every room." Petition at 4. The fact is that there was no bedding in *any* cell. As petitioner's own witness, Licata, emphatically stated: "I never did see no mattresses up there no where and I went all over it." R. 556.

[4] Three reasons were given for the inadequate toilet paper. First, petitioners' witness testified that "they couldn't afford to give them a roll." R. 559. Second, apparently some respondents "misused" toilet paper given them by attempting to cover the bare steel bunks with it. R. 558-59. Third, petitioners' witness testified

Some women were not given sufficient sanitary napkins, with the result that at least one woman was forced to use her slip for that purpose. R. 226, 325.

There was inadequate heat. The temperature ranged between 60 and 70, R. 551, a pleasant fall day unless one was nude or wearing only underwear. Exhaust fans (to "change the air," R. 572) blew intermittently on appellants. R. 225, 267-68, 423, 447. They were freezing, and huddled together for warmth. See R. 225-26, 324, 376-77, 402, 460.

Following additional arrests on Sunday, October 3 at about 10:30 a.m. and Monday, October 4 at about 9:00 p.m., those respondents arrested were detailed in Natchez and then transported to the penitentiary. Their treatment there was similar to that given the initial group. R. 206; Add. 3. The prisoners were ultimately released by Wednesday, October 6. R. 207; Add. 4.

At least two respondents actually "cracked up" as a result of the treatment given them at the penitentiary. See R. 563.

THE DECISION BELOW

The Fifth Circuit, sitting en banc, held that on these undisputed facts, respondents were entitled to judgment under 42 U.S.C. §1983 against petitioner Breazeale for the summary punishment inflicted by him at the penitentiary without any semblance of due process of law, and against petitioner Robinson, who made the arrests, for failing to take respondents before a magistrate as required by Mississippi law.

We think it noteworthy that every one of the sixteen judges of the Fifth Circuit agreed with the result outlined

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that toiler paper was used to stop up toilets. R. 557. This was contradicted. R. 380. After this, toilet paper was issued only in "reasonable amounts," the quantity not specified. R. 557.

above. Eight judges would have disapproved the holding of the panel that the treatment imposed at the penitentiary by Breazeale constituted cruel and unusual punishment prohibited by the Eighth Amendment, while five judges would have gone further and imposed liability on all of the original defendants who participated in the arrests of and detention of respondents. However, all members of the Court concurred in Judge Bell's opinion for the Court. While this Court is certainly not bound by this unanimity in our view this 16-0 decision represents imposing authority for its correctness.

ARGUMENT

I.

THE COURT BELOW PROPERLY FOUND THAT JUDGMENT NOTWITHSTANDING THE VERDICT WAS APPROPRIATE ON UNDISPUTED FACTS.

As previously noted, both the panel and the en banc court relied solely on stipulations and undisputed evidence in determining that judgment notwithstanding the verdict was appropriate. App. 9, 54. There can be no doubt that evidence of such quality warrants withdrawing a case from jury consideration. See *e.g., Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209 (1931); 5A Moore, *Federal Practice* ¶ 50.02 at 2319 n.10 (2d ed. 1971).

Petitioners argue that they perceive a difference in the test for judgments enunciated by the Fifth Circuit in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) and this Court's language in *Brady v. Southern Ry.*, 320 U.S. 476 (1943). In *Boeing*, the court held that "if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict or judgment notwithstanding the verdict] is proper." 411

F.2d at 374. In *Brady*, the Court stated that when "there can be but one reasonable conclusion as to the verdict," a motion for judgment is appropriate. 320 U.S. at 479. We are able to see no significant difference in these two formulations. Indeed, it would seem that the Fifth Circuit in *Boeing* was simply attempting to flesh out the *Brady* test in language that would be usable by a trial or appellate court considering such a motion.

This analysis is, however, irrelevant in the present case for the plain fact is that here judgment was granted on stipulations and undisputed facts, and the courts below thus did not need to choose between any arguably varying standards for weighing facts. Petitioners in essence seek to have this Court review the decision in *Boeing Co. v. Shipman, supra*, but the case before the Court is *Nosser v. Bradley*, and the rule there applied that judgment is appropriate on undisputed facts has, to our knowledge, never been questioned.

II.

THERE IS NO ISSUE OF VICARIOUS LIABILITY IN THIS CASE SINCE THE COURT BELOW DID NOT FIND ANY PETITIONER LIABLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR.

Petitioners argue strenuously that vicarious liability cannot be imposed on petitioner Breazeale in a damage action under 42 U.S.C. §1983. See Petition at 15-19. The fact is that the court below did not impose liability vicariously; Breazeale was held liable for personally ordering and directing the punishment of respondents. As the court stated, "this punishment was solely the work of Breazeale." App. 52. The court further detailed the personal actions of Breazeale in punishing respondents, to which we refer this Court without additional discussion. See App. 52-54.

The decision of the panel makes it crystal clear that no person was held liable vicariously. The panel exonerated one of the original defendants, Commissioner of Public Safety Birdsong, because it found no evidence that he participated in, had knowledge of, or was negligent in supervising highway patrolmen who were alleged to have beaten many of the respondents during the period they were in custody. App. 35-36. The panel specifically noted that, as to the warden, "we do not decide whether the doctrine of *respondeat superior* has vitality in a suit under section 1983." App. 36 n.13. These rulings of the panel were not disturbed by the en banc court.

The doctrine of *respondeat superior* is thus not in any way involved in this case. Petitioners seek no more than an advisory opinion from this Court on this issue.

III.

THE COURT BELOW PROPERLY HELD PETITIONER BREAZEALE LIABLE FOR SUMMARILY PUNISHING RESPONDENTS WITHOUT DUE PROCESS OF LAW.

The undisputed facts make it clear that Breazeale ordered respondents subjected to the same punitive regimen applied to penitentiary prisoners who had violated prison rules and were sent to the maximum security unit for punishment. As we have noted, this treatment included stripping the prisoner, requiring him to consume a laxative, depriving him of bedding, etc. The panel termed this "subhuman treatment which beggars justification and taxes credulity," App. 8-9, and held that it constituted cruel and unusual punishment. The en banc court stated that the punishment "was designed for incorrigible felons but exceeded even the design. It was inflicted arbitrarily and in the unfettered discretion of Superintendent Breazeale." App. 55. The en banc court found this constituted a violation of "a principle basic to

the concept of due process of law—no punishment of mere arrestees without a trial." App. 55.

The notion that persons detained prior to trial are detained solely to insure their appearance at trial and may not be subjected to punishment over and above this simple detention is not novel or startling. Blackstone states:

> "Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand . . . ; there to abide till delivered by due course of law. But this imprisonment . . . is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . . "

4 Blackstone, Commentaries on the Laws of England 300 (7th ed. 1775). There is no dearth of modern cases taking the same view. See *Hamilton v. Love*, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971); *Seale v. Manson*, 326 F. Supp. 1375, 1379 (D. Conn. 1971); *Jones v. Wittenberg*, 323 F. Supp. 93, 100 (N.D. Ohio 1971); *Davis v. Lindsay*, 321 F. Supp. 1134, 1139 (S.D. N.Y. 1970); *Palmigiano v. Travisano*, 317 F. Supp. 776, 785 (D.R.I. 1970); *Tyler v. Ciccone*, 299 F. Supp. 684 (W.D. Mo. 1969); *Butler v. Crumlish*, 229 F. Supp. 565, 567 (E.D. Pa. 1964). See generally Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941 (1970).

The due process clause is an appropriate vehicle through which to protect the dignity and security of arrested, but still presumptively innocent, persons. The basic premise relied on by the court below is that "those who decide to take the law into their own hands and act

as a prosecutor, jury, judge and executioner plainly act to deprive a prisoner of the due process of law guaranteed him." *Screws v. United States*, 325 U.S. 91, 106 (1945). Other cases have found mistreatment of the kind practiced in this case to be due process violations. Thus, in *Monroe v. Pape*, 365 U.S. 167 (1961), part of the police mistreatment complained of was the forced nudity of plaintiffs in the presence of police officers. Justice Frankfurter, even in dissent, agreed that the "calculated degradation of insult and forced nudity" was a violation of due process. *Id.* at 210-11 (dissenting opinion). Forced consumption of a laxative is also unlawful. For example, in *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943), a criminal prosecution, it was held that persons who were forced to drink castor oil, denied food and toilet facilities, and marched out of town on a rope, had been deprived of constitutional rights.

The forced nudity of appellants also invaded one of the basic "zones of privacy," *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), protected by the Constitution. In *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 959 (1964), where the plaintiff was photographed in the nude by police officers, the court stated:

> "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."

Closer factual parallels to the present case may be found in cases testing treatment in prison against the Eighth Amendment, and those cases have universally condemned the kind of treatment respondents here were subjected to.

Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), involved a "strip cell," where the prisoner was kept naked and was denied the use of basic necessities such as toilet paper, soap, towels, and the like. The court held that these "subhuman conditions . . . could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency." *Id.* at 526. In *Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969), the question was the legality of a "dry cell," similar to the strip cell considered in *Wright v. McMann*. The court held that it was "evident that fundamental concepts of decency did not prevail." *Id.* at 791-92. The court added, in words equally applicable to this case (*id.* at 792):

> "Particularly barbaric are the facts that plaintiff is forced to sleep in the nude on a bare concrete floor without even the comfort of a blanket . . . . Equally offensive is the fact that he is provided with no means by which he can maintain his personal cleanliness, with the result that he is forced to live and eat under animal-like conditions."

See also *Kelly v. Butler County Board of Commissioners*, 399 F.2d 133 (3d Cir. 1968), 399 F.2d 132 (3d Cir. 1967); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Knuckles v. Prasse*, 302 F. Supp. 1036, 1061-62 (E.D. Pa. 1969); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

Although the en banc court did not choose to rest its decision on the Eighth Amendment, these cases constitute important support for its due process decision, for if treatment of the kind administered here cannot be imposed on convicts because of the Eighth Amendment, it certainly could not be imposed on non-convicts

without any due process safeguards whatsoever. Even convicts are entitled to minimum due process safeguards before any substantial deprivations may be imposed on them for prison misconduct. *E.g., Sostre v. McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971) (en banc).

Finally, we would note that respondents were also denied equal protection by the treatment here imposed. As pre-trial detainees, they were entitled, at worst, to be treated the same as ordinary convicts incarcerated at the state penitentiary. See *Hamilton v. Love, supra*, 328 F. Supp. at 1191 (conditions for pre-trial detainees must be *superior* to those of convicted prisoners). Yet respondents were not treated as ordinary convicts; they were treated as convicts who had violated prison regulations and were accordingly punished. This arbitrary classification denied respondents equal protection of the laws.

In summary, there was utterly no justification for the inhuman and degrading treatment of respondents. The primary defense that this treatment was necessary because respondents were housed in the maximum security unit and that was the standard procedure in maximum security is one that no court could accept, and indeed all sixteen judges of the en banc court rejected it. It is akin to saying that if, perchance, respondents had been housed on death row, then execution would be the necessary concomitant. In our view, the en banc court properly held this a violation of due process, the panel properly held it to constitute cruel and unusual punishment, and the equal protection clause would also be a sound basis for decision.

IV.

THE COURT BELOW PROPERLY HELD PETITIONER ROBINSON LIABLE UNDER STATE LAW BECAUSE OF HIS UNDISPUTED DENIAL OF RESPONDENTS' RIGHT TO BE TAKEN BEFORE A MAGISTRATE.

It is admitted that none of the respondents was taken before any judicial officer at any time. (R. 203; Add. 2, 3.) Further, no attempt was even made to do so. The arresting officer, petitioner Robinson, testified:

> "Q. Well, to your knowledge, Chief Robinson, did you or anyone else to your knowledge who was an official of the city of Natchez make any attempt to bring any of these people before a magistrate, justice of the peace, or any judicial officer before they were sent to Parchman?
>
> "A. No, sir." (R. 303)

Robinson's justification for failure to take appellants before a judicial officer was that they had not posted bond:

> "Q. What happened relative to that, Chief Robinson, relative to them being taken before Judge Keyer? Were they taken before Judge Keyer?
>
> "A. The bonds were set, the ones that got out on bonds, were set returnable before Judge Keyer." (R. 500)

Robinson admitted that in requiring a bond as a condition to presentation to a magistrate, he was not acting in accordance with law:

> "Q. Chief Robinson, do I understand your testimony to be then that before anybody could have been taken before a magistrate they had to put up a $200.00 bond, is that true?
>
> "A. Yes, sir, a $200.00 property bond."

* * *

"Q. . . . I assume then that you are aware that any officer making an arrest in the state of Mississippi is required to bring his prisoner before a magistrate without unnecessary delay. Are you aware of that statute?

"A. Yes, sir."

* * *

"Q. And did that statute ever provide in there that they had–anybody had to put up any amount of bail before he could be taken before a magistrate?

"A. Not to my knowledge.

"Q. So the fact that anybody didn't put up bail has nothing to do with going before a magistrate, isn't that right?

"A. That's right.

"Q. And you know that?

"A. That's right.

"Q. But you didn't do that?

"A. That's exactly right." (R. 503-04)

These undisputed facts clearly entitle respondents to judgment for false imprisonment under Mississippi law. Since as early as *Anderson v. Beck*, 64 Miss. 113, 8 So. 167 (Miss. 1886), Mississippi has recognized that delay in bringing a prisoner before a magistrate gives rise to an action for false imprisonment:

> "A warrant is process for the arrest of a person who, when arrested, should be taken before an officer authorized to inquire into the cause of arrest, and the unexplained detention of the party by virtue of process for his arrest without any *mittimus*, was a cause of action."

By statute, "every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case." Miss. Code 1942 Ann. § 2473.

Under the statute, where there is no arraignment on the date of arrest, the burden of proof shifts to the arresting officer "to show that a reasonable effort was made to induce a magistrate or justice to issue a warrant and fix bail on the date of arrest." *Sheffield v. Reece,* 20 Miss. 133, 28 So.2d 745, 749 (1947). See also *Anderson v. Beck, supra,* making actionable an "unexplained" detention. Presentation to a magistrate is required to grant the accused "an opportunity to have a hearing on the merits of the accusation against him." *Sheffield v. Reece, supra,* 28 So.2d at 746. Where the accused can promptly post bond and secure his liberty, compelling reason for immediate presentation for inquiry into the merits disappears. But where those arrested cannot make bond immediately, as in the present case, presentation before a magistrate becomes imperative. As the court stated in the *Sheffield* case, "one thus arrested may, in some instances, be unable to execute a bail bond, but he is nevertheless entitled, in such event, to have his case examined into without unnecessary delay." *Id.* at 746-47. Here, of course, none of the respondents could execute a bond, and it was therefore Robinson's duty to bring them promptly before a magistrate.[5] He made no attempt whatsoever to do so.

Petitioners apparently seek to explain Robinson's failure to make any attempt whatever to secure a magistrate on the ground that the first arrests were made Saturday afternoon and Robinson was "well aware" that

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[5]A defense that delay was necessary or reasonable was not attempted, but in any event delay of up to five days seems unreasonable as a matter of law. *Cf. Sheffield v. Reece, supra,* where the delay was from Saturday to the following Monday, and *Dunning v. State*, 251 Miss. 766, 171 So. 2d 315 (Miss. 1965), where the Court assumed that an unexplained three and one-half day delay was undue delay.

the municipal judge was not in his office Saturday afternoons or Sunday. Petition at 24.

First, the initial arrests were made on Saturday *morning* when, according to petitioners, the judge was holding court. (R. 202, Add. 1) Second, there is nothing in the record to indicate that the local judge would not have remained in his office Saturday afternoon,[6] particularly since Miss. Code 1942 Ann. §3374-103 requires a municipal judge to hold office on Saturdays "if the business of the municipality requires," and it might be assumed that hundreds of arrests in the municipality would constitute such business. Third, there is no explanation why no attempt was made to bring respondents before a judge on Monday, Tuesday or Wednesday, while they were still incarcerated.

But these are merely suppositions, and we are left to supposition because of the simple fact that petitioner Robinson, who made the arrests, gave no reasons whatever for failing to bring respondents before a magistrate. Thus, we do not know that the magistrate was unavailable, even though petitioners' counsel now say he was, because no attempt was made to see if he was available. The burden of explaining a failure to present an arrestee to a magistrate rests, in Mississippi law, quite clearly with the arresting officer, and Robinson did not meet this burden. He cannot evade liability by now hypothesizing all the things that might have occurred had he attempted to secure a magistrate.

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[6] Indeed, there is nothing in the record to indicate the local judge was in fact not in his office. This is simply the assertion of petitioners in their Petition.

V.

PETITIONER BREAZEALE HAS NO IMMUNITY FROM DAMAGES FOR VIOLATION OF THE CONSTITUTIONAL RIGHTS OF PERSONS IN HIS CUSTODY.

Petitioner Breazeale argues that this Court should grant to state prison officials an absolute immunity for actions, such as those in the present case, which deny their prisoners fundamental constitutional rights. Such an immunity would essentially nullify the basic purposes of 42 U.S.C. §1983, for that statute is only applicable to persons acting under color of state law, and can thus rarely be satisfied except in the case of a state official. See, *e.g., Jobson v. Henne,* 355 F.2d 129, 133-34 (2d Cir. 1966); *Birnbaum v. Trussell,* 347 F.2d 86, 88-89 (2d Cir. 1965). Nevertheless, petitioners cite cases dealing with immunity of legislative or judicial officers, or of administrative officers, such as parole officers, who act in a judicial or quasi-judicial capacity, and argue from this that all state officials are immune from damages in suits under section 1983.

It is clear that this is not the law. 42 U.S.C. §1983 authorizes actions against state officials for deprivation of constitutional rights, and monetary damages are an appropriate remedy under the statute. *E.g., Monroe v. Pape,* 365 U.S. 167 (1961); *Hague v. CIO,* 101 F.2d 774 (3d Cir. 1939), modified on other grounds, 307 U.S. 496. Only recently, this Court held that state prison officials may be required to stand trial for monetary damages in 1983 actions, *Haines v. Kerner,* 404 U.S. 519 (1972), and the Court has repeatedly held that section 1983 is an appropriate vehicle through which state prisoners may assert basic constitutional rights. *Wilwording v. Swenson,* 404 U.S. 249 (1971); *Washington v. Lee,* 390 U.S. 333 (1968); *Cooper v. Pate,* 378 U.S. 546 (1964).

Against this background, it is not surprising that lower federal courts have rejected the notion that state prison officials are immune from damages if they violate the constitutional rights of their prisoners, and they have awarded damages in appropriate cases. See, *e.g.*, *Sostre v. McGinniss*, 442 F.2d 178, 205 n. 51 (2d Cir. 1971) (en banc); *United States ex rel. Jones v. Rundle*, 453 F.2d 147, 150 n. 11 (3d Cir. 1967); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967), *on remand*, 321 F. Supp. 127, 143-44 (N.D. N.Y. 1970). See also the extensive discussion of the panel in the present case on the question of immunity, in which the en banc court concurred. (App. 37-40).

Pierson v. Ray, 386 U.S. 547 (1967), indicates that in order to determine whether an immunity exists under section 1983 it is appropriate to look to the common law dealing with the kind of official against whom liability is asserted and the kinds of acts that official is alleged to have committed. Resort to the common law of both Mississippi and the remainder of the states shows that jailers and wardens have never enjoyed any immunity for mistreatment of prisoners in their care.

Mississippi law is crystal clear on this point. In *Farmer v. State*, 79 So.2d 528, 531 (Miss. 1955), the Mississippi Supreme Court rejected a defense of immunity and imposed liability on a jailkeeper, adopting the holding of *State ex rel. Tyler v. Gobin*, 94 F. 48, 50 (C.C. Ind. 1899), where it was stated:

> "If the law imposes [upon a sheriff] a duty of care in respect to animals and goods which he has taken into his possession by virtue of his office, why should not the law impose the duty of care upon him in respect of human beings who are in his custody by virtue of his office? . . . When a sheriff, by virtue of his office, has arrested and imprisoned a

> human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond."

In *Roberts v. Williams,* 302 F. Supp. 972 (N.D. Miss. 1969), *aff'd,* 456 F.2d 819 (5th Cir. 1971), the district court, interpreting Mississippi law, held that the superintendent of a county penal farm enjoyed no immunity if he failed to properly care for prisoners under his control, and imposed liability under state law. 302 F. Supp. at 985-86. See also *Bacon v. Bacon,* 24 So. 968 (Miss. 1899), where the court found the superintendent and trustees of a state mental institution liable for improperly admitting persons thereto.

The common law in other American jurisdictions is no different. The general rule was stated in *City of Topeka v. Boutwell,* 35 P. 819, 822 (Kan. 1894):

> "[H]aving the prisoner fully in his power, the officer is then liable for any unnecessary harm or indignity done to the prisoner. It is the duty of all keepers of jails and prisons to treat their prisoners humanly. [They] . . . have no warrant or authority in law to be harsh and brutal in the management of those in their custody. For all needless sufferings and indignities which they impose they are accountable in damages . . . ."

See also *Kendrick v. Adamson,* 180 S.E. 647, 648 (Ga. 1935); *Village of Nixa v. McMullin,* 193 S.W. 596, 598 (Mo. 1917); *Hale v. Johnston,* 203 S.W. 949, 952-53 (Tenn. 1918); *Clark v. Kelly,* 133 S.E. 365, 368-69 (W.Va. 1926).

Since there is no immunity under Mississippi law or in the jurisprudence of other states for persons who mistreat prisoners in their custody, the court below was clearly correct in holding that no immunity should be read into section 1983 for such mistreatment.

VI.

THE FACTS RELIED ON BY THE FIFTH CIRCUIT IN REACHING ITS DECISION WERE UNCONTROVERTED.

Petitioners assert that there is substantial evidentiary conflict in the record as to facts relied on by the court of appeals in reaching its decision. We have extensively set forth the uncontroverted facts in our Statement of the Case, as did the panel (App. 9-12) and the en banc court (App. 50-54), and will thus limit this discussion to commenting on certain assertions of petitioners.

First, on the issue of nudity, petitioners state that there is an evidentiary dispute as to whether the male plaintiffs were made to strip naked and remain so for a day or more. Petition at 46. Yet, in their Statement of the Case, petitioner themselves state that "there was a shortage of underwear[7] which resulted in *some* of the detainees being left without clothing for periods as long as 36 hours." Petition at 4. Petitioners' own witness, Mr. Licata, upon whom they place great reliance, testified that he observed nude men in the cells. (R. 557). In short, we can see utterly no conflict in the en banc court's statement that "they were stripped of their clothing and left naked for varying periods of time, some for as long as 36 hours." (App. 53).

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[7]The record is devoid of evidence that the reason for the nudity was a shortage of underwear. Petitioners' counsel have apparently supplied this fact for the first time in this petition.

Petitioners state that there is evidence that no one was "required or forced" to consume a laxative. Petition at 39. The *stipulated* facts are that respondents "were required to . . . consume a quantity of laxative." (R. 205, Add. 3). Petitioners cannot avoid this stipulation by arguing that of the more than 250 persons incarcerated during this time, two may have evaded the laxative.

Petitioners cite Mr. Licata's testimony to the effect that respondents' were initially given "plenty" of toilet paper but this was cut when they "misused" it. Petition at 38. We do not see that this conflicts with testimony that respondents were given about one lap around a roll for each person in a cell. See R. 226, 325, 404, 460.

Petitioners offer no evidentiary conflict to the undisputed facts that respondents were given no bedding whatever or toilet articles such as soap, towels and the like; that they were herded up to eight to a cell and forced to sleep on bare steel bunks or concrete floors; that the temperature ranged from 60 to 70 degrees and that exhaust fans were in operation; that respondents, who were nude or wearing only underwear and were inactive for extended periods, were freezing under these conditions, and the like.

In conclusion, we would again emphasize that the facts relied on by the court below appeared in stipulations, admissions, and uncontradicted testimony, and none of the sixteen judges who reviewed this case found any evidentiary dispute in the record, on those facts relevant to the decision.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EXCERPTS FROM PRE-TRIAL ORDER
(R. 201-08, 1229-42)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

KATIE RUTH ANDERSON, *et al.*,
Plaintiffs,

v. No. GC669-K

J.J. NOSSER, *et al.*,
Defendants.

JAMES BRADLEY, *et al.*,
Plaintiffs,

v. No. GC 6654

J.J. NOSSER, *et al.*,
Defendants.

PRE-TRIAL ORDER

1. A pre-trial conference was held in this matter on the 23rd day of December, 1968, at 2:00 P.M.

* * * * *

7. The facts established by the pleadings or by stipulation or admission of counsel are as follows:

On or about October 2, 3, 4, 1965 plaintiffs and others engaged in Civil Rights demonstrations and marches in Natchez. Sometime between 10 A.M. and noon on Saturday, October 2, 1965, a large number of marchers, including some of plaintiffs were placed under arrest after marching half a block from Beulah Baptist Church and charged with violating Natchez Parade Ordinance of May 26, 1964, Ordinance Book F. p. 395. The arrested marchers, including plaintiffs were transported in buses

to the Natchez Municipal Auditorium. At the Auditorium, the arrested marchers were asked their names, addresses and ages, but they were not brought before any judicial officer for examination of their case. No written Youth Court order was obtained respecting any of the arrested marchers.

Late Saturday night those of the plaintiffs arrested that day, among others, were lined up in the auditorium and told that they were being taken someplace that had facilities to put them up comfortably, since the city did not have adequate facilities. Some of the children under 16 were released in the custody of their parents. A large number of marchers, including all of the plaintiffs arrested on Saturday, were put on three Trailways buses and driven to Mississippi State Penitentiary at Parchman. Defendant Breazeale, Superintendent of Parchman was called and notified of arriving prisoners, but no court order was obtained for their transfer.

The buses to Parchman were guarded by Natchez firemen, acting as ex-officio police officers. Eight members of the Mississippi Highway Safety Patrol travelling in four patrol cars met the buses in the vicinity of Natchez and escorted them to Parchman.

The buses arrived at Parchman early Sunday morning October 3, 1965 and proceeded to the compound containing penitentiary's Maximum Security Unit. The maximum security building has two wings, each divided into two cell blocks with 13 cells each, for a total of 52 cells. One of the four cell blocks, containing 13 cells is Parchman's "Death Row." Each cell contained two steel bunk beds, a toilet and a wash basin. Three of the cell blocks, excluding Death Row, contained a total of 39 cells, had been vacated to receive the Natchez prisoners.

The men prisoners, including all the male plaintiffs that had been arrested on Saturday were required to strip naked and consume a quantity of laxative. They were inspected and searched. The men were then placed in cells. The female prisoners, including all the female plaintiffs that had been arrested on Saturday were required to remove their shoes, stockings, sweaters, coats, jewelry and wigs, but not their undergarments, dresses, blouses, and pants, and were searched by female employees and trustees. They also were given a quantity of laxative. The women were then placed in cells. The prisoners were segregated by sex but not race. No one was permitted to carry any personal belongings into their cells including medicines and sanitary napkins.

On Sunday, October 3, 1965, about 10:30 A.M. a large number of marchers, including some of the plaintiffs, were placed under arrest shortly after the march began at Beulah Baptist Church and charged with a violation of the same ordinance. They also were taken to the Auditorium. Children under 13 were released later that day in the custody of their parents. Other arrested marchers, including all of the plaintiffs arrested that day, were sent to Parchman on two buses. The treatment of the prisoners at Parchman was similar to the treatment of the earlier group.

On Monday, October 4, 1965, about 9 P.M., a large number of marchers were placed under arrest after marching about 60 yards from China Grove Baptist Church. They were taken to the Auditorium and later that evening some of them, including all the plaintiffs arrested that day, were sent to Parchman on a single bus. The treatment of the prisoners was similar to the treatment of the first group of prisoners.

Prior to release of the prisoners, many, including many of the plaintiffs, had blood samples taken from them.

Plaintiffs were released on Monday, October 4, 1965, Tuesday, October 5, 1965 and Wednesday, October 6, 1965.

At all times relevant to the amended complaints defendant Nosser was Mayor of Natchez, Mississippi; defendant Robinson was City Marshall and Chief of Police; defendant Cameron was Fire Chief, and defendants Richard, Cowart, Beach and Flowers were members of the police force.

At all times relevant to the amended complaints defendant Birdsong was Commissioner of Public Safety of the State of Mississippi charged by law with the duty of supervision and control of all Mississippi Highway Safety Patrolmen.

At all times relevant to the amended complaints . . . defendant Breazeale was Superintendent of Parchman . . . .

At all times relevant to the amended complaints, New Hampshire Insurance Company was surety for defendants . . . Breazeale, pursuant to Mississippi Code, 1942, Section 7924, as amended.

18. This pre-trial order has been formulated after a conference at which counsel for the respective parties appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. However, this order will control the course of the trial, and it may not be amended except by consent of the

parties and the court, or by order of the court to prevent manifest injustice.

This, 3rd day of March, 1969.

/s/ William C. Keady
UNITED STATES DISTRICT
JUDGE

/s/ L. A. Aschenbrenner
Attorney for Plaintiff

/s/ Joseph L. Zuccaro
Attorney for Defendant

/s/ Edwin E. Benoist, Jr.

/s/ C. A. Marx

/s/ William A. Allain

CERTIFICATE OF SERVICE

I certify that I have this day mailed, air mail postage prepaid, three copies of the foregoing to William Allain, Esq., P.O. Box 220, Jackson, Mississippi 39205, attorney of record for petitioners.

This the 30th day of June, 1972.